General No. 11804 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT-FIRST DIVISION

October Term, A.D. 1963

45 I.A.2 88

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| SIMON J. CARLSON & SON, INC., an Illinois Corporation, Plaintiff-Appellee, vs. PAUL G. FRICKE, Defendant-Appellant. | ) | Appeal from the Circuit Court, Winnebago County, Illinois. |



DOVE, J.

Paul G. Fricke seeks, by this appeal, to reverse a judgment rendered by the Circuit Court of Winnebago County, in favor of Simon J. Carlson and Son, Inc., and against him and Dualoc Drive, Inc. This judgment was for $2500.00 and interest thereon at 5% from March 10, 1960. The judgment order found that this judgment is for a tort committed by defendant, Fricke; that malice is the gist of the action; and adjudged that by virtue of the fraud of this defendant plaintiff have and recover from Fricke "the further sum of $250.00 as and for punitive damages" and that plaintiff have execution against the body of this defendant.

The cause was heard by the court without a jury, and from the pleadings and evidence it appears that plaintiff is an Illinois Corporation engaged in a general plumbing and heating business; that all of its stock is held by Roland Carlson and his wife and that Roland Carlson is president and general manager of the company. Dualoc Drive, Inc., is also an Illinois Corporation and the owner of a substantial amount of real estate. Paul G. Fricke was president and general manager of this corporation and had been since 1948.

Plaintiff had been given notice that the premises occupied by it as its office and plant site had been sold and Mr. Carlson was anxious to obtain a new location. He learned about the Dualoc property and contacted defendant, Fricke, at his office on March 10, 1960, and told him of his pressing need for a new office and plant site. Mr. Fricke suggested that they go out and look at the property at the corner of Harrison Avenue and Twentieth Street in Rockford and they did so in Fricke's car.

Previous to this time the parties had never met. According to the testimony of Mr. Carlson, he, Carlson, asked Fricke if he was the owner of this corner property and Fricke said he was; that Carlson told Fricke that he needed the property immediately to construct new buildings for his office,and Fricke said there would be no problems; that the price of the Harrison Avenue corner lot was discussed and Carlson offered Fricke $16,000.00 for the property; that Fricke said the property was worth more, but accepted the offer. Mr. Carlson

delivered to Mr. Fricke a check of plaintiff for $2500.00 and the parties signed the following instruments, viz.:

"PURCHASE AGREEMENT

"March 10, 1960

"I hereby accept in the interests of Dualoc Drive, Inc., $2,500.00 earnest money deposited against the purchase of 200 ft on Harrison Avenue--Express frontage to be from a point 200 ft East of the corner pin at Harrison Avenue and thence East 200', said property to extend 320 ft South. Total purchase price is $16,000.00.

"Balance payable in cash upon receipt of warranty deed and evidence of Merchantable title. Seller agrees to furnish above within five days so buyer can begin construction at once.

"As a part of this option, the buyer and seller agree that a 60ft set-back of buildings from the lot line on Harrison is a part of this agreement.

"Signed Paul G. Fricke, Pres.
DUALOC DRIVE INC.

"I hereby accept this agreement and pay this $2,500.00 as earnest money to Dualoc Drive, Inc., to bind this agreement.

"Signed Roland E. Carlson
Simon J. Carlson & Son Inc.

1110 Charles Street Rockford, Illinois"

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"DUALOC DRIVE, INC.

"700 Twentieth Street WOodland 2-5593

"Rockford, Illinois
"March 10, 1960

"Mr. Rollie Carlson

"This is to acknowledge receipt of $2,500.00, earnest money to apply on the purchase of a tract of land, 200 ft. x 320 ft., starting at a point 200 ft. East of

the North West corner of our property at Harrison Ave. and Twentieth Streets, thence East along Harrison Ave. 200 ft., thence South 320 ft., on a line parallel with our West line, thence West 200 ft. on a line parallel with Harrison Ave., thence North 320 ft., to the place of beginning.

"1. Total purchase price to be $16,000.00.

"2. Subject to taxes for 1960.

"3. Subject to existing easement with Rockford Sanitary District.

"4. Subject to grantor to have right of extending sewer along Harrison Ave.

"5. Conveyance to provide that buildings are to be set back at least sixty feet from the front of lot nine.

"All part of the N.W.¼ of Section 6, T. 43 N., R. 2 E. of the 3rd P.M.

"DUALOC DRIVE, INC.

/s/ Paul G. Fricke
Paul G. Fricke, President

Accepted by:

/s/ Roland E. Carlson"

Mr. Carlson further testified that Mr. Fricke assured him he would have title in five days and told him he needed the $2500.00 in order to provide title by that time. On or shortly after March 15, 1960, Carlson testified that he talked to Fricke over the phone, stating that he was concerned about the title and told him he wished to start building, and Fricke said for him to go ahead, but Carlson refused, stating he would not begin building without having evidence of title. It was at this time that Fricke requested Carlson to advance

him some more money in order to facilitate the deal, but Carlson refused, saying "you give me a good deed and I'll give you the whole amount, but I need it now." To this Fricke replied: "You have got to give me more money, the next move is up to you." Carlson subsequently contacted his attorney who communicated with Fricke who referred him to his attorney. Carlson's attorney requested Fricke's attorney to procure for his client either a deed or the return of the $2500.00. The reply to this request was that a partial release of the property from the lien of the mortgage could not be obtained and that there was no money in the corporation treasury so that the $2500.00 could not be returned. Thereafter the instant action was commenced.

Mr. Fricke testified that he never told Mr. Carlson that he was Dualoc Drive or that he owned the land personally, but did tell him that there was a mortgage on the property and assured him that he could get a partial release. He testified that he endorsed the $2500.00 check which he received from Carlson and deposited it in the account of Dualoc Drive, Inc. Mr. Fricke further testified that the mortgage on the property to which he referred was in default at the time of his transaction with Carlson and that on April 2, 1960, foreclosure proceedings were instituted.

Mr. Fricke further testified that at the time of the hearing, December 4, 1962, Dualoc Drive, Inc., was still in existence and that it had never been insolvent; that the

first time he ascertained that his company could not convey the property which he sold to Carlson was at least three months after his transaction with Carlson. There is other evidence in the record, however, to the effect that the trial balance sheets of Dualoc Drive, Inc., dated February 29, 1960, and March 31, 1960, indicated that, as of February 29, 1960, the liabilities of this company exceeded its assets by $175,000.00 and on March 31, 1960, its liabilities exceeded its assets by $271,000.00. The accountant and consultant who so testified, further stated that in his opinion the company was insolvent.

In Martin v. Sixty-third and Halsted State Savings Bank, 299 Ill. App. 123, it is said, (p. 127) that the essential elements of a cause of action in a case for fraud and deceit are a representation, falsity, scienter, deception and injury. In the instant case Fricke did not disclose to Carlson the true facts concerning the title to the premises which was the subject matter of the agreement. Carlson testified that he asked Fricke if he was the owner of the property and Fricke said he was. This was not true. Fricke also represented to Carlson, according to Carlson's testimony, that Dualoc was a solvent, prosperous corporation. This statement also was false.

In disposing of this case the trial court stated that Mr. Fricke agreed t[illegible] convey[illegible] to plaintiff, to th[illegible]

the parties, within five days from the date of the contract; that Fricke, as an officer of Dualoc Drive, Inc., knew or should have known that title could not possibly be furnished within that period of time. The trial court also found that all the elements essential in an action for fraud and deceit were present and the evidence sustains this finding.

In his statement of facts, counsel for appellant states that no deed to the property described in the purchase agreement,signed by the parties, was ever tendered plaintiff. No abstract of title was ever furnished plaintiff and the $2500.00 paid by the plaintiff on March 10, 1960, has never been repaid. The property described in the purchase agreement was, at the time Mr. Fricke accepted appellee's $2500.00 check, subject to a mortgage to secure the payment of a note for $220,000.00 signed by Dualoc Drive, Inc., and by Mr. Fricke personally. On June 3, 1960, a decree foreclosing this mortgage was entered by the Circuit Court of Winnebago County, the decree finding that at that time there was due the mortgagee $229,000.00. The property was subsequently sold under this decree to the note holders.

Counsel for appellant argue that even if Mr. Fricke stated that his title was free and clear of all liens, Mr. Carlson should not have relied upon any such representation because the title to real estate is a public record and had he investigated the records he could have determined "in five minutes the status of this title." There is no merit in

this argument. In Pustelniak v. Vilimas, 352 Ill. 270, the court said (p. 276): "When statements are of material matters of fact which, from their nature, may be assumed to be within the knowledge of the party making them, the party to whom they are made has a right to rely upon them, and in the absence of any knowledge of his own, or of any facts which should arouse doubt or suspicion, is not bound to make inquiries and examination for himself. (Hicks v. Stevens, 121 Ill. 186) A party guilty of fraudulent conduct whereby he induces another to act will not be allowed to impute negligence to the latter as against his own deliberate fraud."

It is finally contended that the trial court was not warranted in finding that malice is the gist of this action. This action was brought to recover money obtained by false and fraudulent statements. The motive which actuated defendant in obtaining plaintiff's money when he knew that he would not be able to carry out the terms of his agreement was highly improper. "In determining whether malice was the gist of the action---the word 'malice', is to be taken to mean not spite or hatred against an individual, but that the party is actuated by improper and indirect motives, and the phrase 'gist of the action', is to be taken to mean the cause for which the action will lie, the ground or foundation of the action without which it would not be maintainable or the essential ground or object of the action, without which there is no cause of action." (18 I.L.P. Title Executions, 619)

When malice is found to be the gist of the action, exemplary or punitive damages may be awarded, including interest from the date of the fraud and in contemplation of the necessary expenses of litigation. (19 I.L.P. Title Fraud, sec. 55)

There is no reversible error in this record. The judgment of the Circuit Court is therefore affirmed.

Judgment Affirmed.

McNeal, P.J., concurs.

Smith, J., concurs.

(32825—9-66) 14

# STATE OF ILLINOIS

## APPELLATE COURT



AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE WILLIAM M. CARROLL, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 9th day of JANUARY A. D. 1964, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10486 Agenda No. 1

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| The People of the State of Illinois, Plaintiff-Appellee, vs. John Dulakis, Defendant-Appellant. | ) | Appeal from the County Court of Christian County |

ROETH, Justice.

Defendant was found guilty of aggravated assault by a jury in the County Court of Christian County and was fined $300.00 and costs. He brings this appeal and makes two contentions for reversal: (1) that the evidence does not show an overt act; and (2) that his actions were justified under Illinois Criminal Code of 1961, Art. 7, Sec. 7-1, 7-2 and 7-3.

The evidence on behalf of the People consisted of testimony of two witnesses. The Village Marshal testified that he was charged with keeping law and order and had responsibilities with regard to dogs and cats and other animals. He went to the defendant's premises to sell a dog tag for a black-and-white dog thereon. He was told by defendant's wife that the dog was not hers. He informed her that if the dog did not have a tag, the rabies inspector would pick it up. The following week, on April 21, he returned to defendant's home with the assistant rabies inspector. Defendant told them the dog was

not his and to get it. Thereafter, according to testimony of both the marshal and the rabies inspector, they tried to catch the dog, but being unable to do so, the latter said he would have to shoot it. Defendant told them not to kill the dog in his yard. When the rabies inspector secured a gun, the defendant appeared with a shotgun in his hand pointed at the rabies inspector and told them they were not "going to shoot that dog". Whereupon, both officials left the premises.

On defendant's contention that this evidence does not show an overt act, we are referred to cases that were decided before the present Act was adopted. In 1961, however, the definition of assault was considerably revised. It provides as follows:

> "A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery."

Criminal Code of 1961, Par. 12-1. In Par. 12-2, the Act defines aggravated assault to be when a person "uses a deadly weapon". Prior to the 1961 Code, assault was defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another". Chap. 38, Par. 55, Ill. Revised Statutes of 1959. Since no "attempt" is required by the new Act, no overt act is necessary.

Defendant's second point is that he was justified in his conduct by the Criminal Code of 1961 under Paragraph 7-1, 7-2 and 7-3 providing for the use of force to defend himself, his dwelling, or other property. However, there was no evidence showing a basis for

a reasonable belief in the necessity to defend himself or his property by force inasmuch as they were not threatened. The only thing threatened was a dog which defendant disowned and which might have been rabid.

Judgment affirmed.

Carroll, Presiding Justice, and Reynolds, Justice, concur.

49108

45 I.A.2 249

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| JOSEPH TILGHMAN, d/b/a V and J SEWERAGE,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>GEORGE DELBERT GRAY, et al.,<br><br>Defendants-Appellants. | ) | APPEAL FROM<br><br>MUNICIPAL COURT<br><br>OF CHICAGO |

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In an amended statement of claim plaintiff asked judgment for $546.35, the balance due on a contract for installing a flood control system at 5533-59 North Magnolia Avenue, Chicago. The court found the issues against the defendant and entered a judgment for the plaintiff for $500. The court also found against the defendant on his cross complaint for damages caused by defective work by the plaintiff in endeavoring to install the system. Defendant, appealing, asked that the judgment against him be reversed and that judgment be entered in his favor for $226.20 on his counter complaint. Plaintiff has not appeared in this court.

The plaintiff furnished certain labor and material for the system, both direct and through sub-contractors, on Saturday, October 1, 1960. He was to return and complete the contract on the following Monday. Plaintiff did not complete the contract. The defendant paid $1,378.65 to sub-contractors for materials and labor furnished at the request of plaintiff.

The defendant spent $247.55 because of the failure of plaintiff to complete his contract and will be required to spend an additional amount estimated to be $525, or $226.20 more than the claim of the plaintiff. The evidence shows that plaintiff breached his contract. He did not make out a case entitling him

to a judgment. The defendant, appearing pro se, stated during oral argument that in a desire to terminate the litigation he wished to waive his demand for judgment on the counterclaim. Therefore, the judgment against defendant, Gray, is reversed and judgment is entered for George Delbert Gray, the defendant, and against Joseph Tilghman, the plaintiff and the counterclaim is withdrawn.

JUDGMENT REVERSED, JUDGMENT ENTERED HERE, AND COUNTERCLAIM WITHDRAWN.

FRIEND, J., and BRYANT, J., concur.

49049

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| JANE CRAAYBEEK, Appellant, | ) | APPEAL FROM |
| v. | ) | SUPERIOR COURT, |
| SIMON CRAAYBEEK, Appellee. | ) | COOK COUNTY. |

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

On March 7, 1962 Jane Craaybeek filed a complaint for divorce against her husband Simon Craaybeek in which she alleged desertion. Although personal service of summons was had on defendant he failed to appear. Thereafter, pursuant to notice, the court entered an order of default and provided for alimony. In due course plaintiff appeared in court to prove up the allegations of the complaint, and on May 15, 1962 the court entered a decree of divorce on the ground of desertion. Subsequently the decree was modified, after notice to defendant, to allow plaintiff to resume her former name, and the decree as modified was forwarded to defendant by certified mail. Thereafter an order was entered against defendant to show cause why he should not be held in contempt of court for his failure to comply with certain provisions of the decree. Defendant concedes that he knew of the divorce decree, but he made no effort to challenge its validity until August 9, 1962, some eighty-six days after the decree was entered and after a writ of attachment had been issued against him; on that day he filed his petition seeking to vacate the decree on the ground of fraud. Plaintiff filed an answer, a hearing was had, and on September 12, 1962 the court entered an order that specifically found there was insufficient evidence to support the charge of perjury and likewise insufficient evidence to support

the charge of desertion, and of his own motion vacated the divorce decree. Subsequently the court entered an order denying plaintiff's motion to vacate the order vacating the decree, and plaintiff appeals from this order.

The question presented is whether the court had jurisdiction, after the lapse of eighty-six days, to vacate the original decree. The sole ground, presumably, for petitioning the court to vacate the decree was that plaintiff and her witnesses had committed perjury, but since the court specifically found from the testimony of the witnesses that "there is insufficient evidence to support the charges of perjury," the court should have denied the petition to vacate the decree. In the early case of Guggenheim v. Guggenheim, 189 Ill. App. 151, 152 (1914), where, under similar circumstances, an action was brought to vacate a decree of divorce, the court held that it was a final decree. "It was not void on its face, but regular and valid, and the Circuit Court had no jurisdiction to vacate or set it aside after the expiration of the term at which it was entered. The court had lost jurisdiction of the case." In Sim v. Sim, 247 Ill. App. 321 (1928), defendant in a default divorce proceeding filed a verified petition which asserted that at the time of his alleged marriage with plaintiff she was legally married to another man who was still living and from whom she had never been divorced. Defendant asserted that he did not know of the prior marriage until long after the entry of the decree against him, alleged that by means of her concealment plaintiff fraudulently imposed on the court and procured the decree, and on these grounds he asked that the decree theretofore entered be vacated and set aside. On review the court said (p. 325) that if defendant subsequently became aware of facts which, if

known to the trial court, would have produced a different decree, the proper method after the term to present such facts was by a bill of review; inasmuch as defendant had failed to pursue the proper remedy the reviewing court reversed the order of the trial court which had vacated the original divorce decree. Tobias v. Tobias, 193 Ill. App. 95 (1915), is to the same effect. Defendant makes no attempt to proceed under the provisions of section 72 of the Practice Act (Ill. Rev. Stat. 1963, ch. 110); indeed, the allegations in his petition would not have permitted him to do so because they do not conform to the requirements of that statute.

Defendant relies on the early case of Chatterton v. Chatterton, 231 Ill. 449, 83 N.E. 161 (1907), and the recent case of Williams v. Williams, 34 Ill. App.2d 210, 181 N.E.2d 182 (1962). In the Chatterton case a writ of error was sued out to reverse the divorce decree. On appeal the court held that a decree of divorce in favor of the wife upon the ground of desertion was properly reversed where the evidence preserved failed to show that the desertion was willful or without reasonable cause, as required by the statute. In the case at bar plaintiff and her two witnesses testified that defendant had left plaintiff without cause, more than a year before the complaint was filed, and that plaintiff had since the separation lived separate and apart from her husband without any fault on her part. In the Williams case there is no suggestion that the unsuccessful defendant attacked the decree after the term in which it was entered. In Howard v. Howard, 304 Ill. App. 637, 26 N.E.2d 421 (1940), also cited by defendant, the court on review affirmed the decree of the trial court vacating and setting aside a divorce decree on a motion filed more than sixty

days after its entry; the evidence showed that the entry of appearance was forged and that neither party lived within the territorial jurisdiction of the court.

We hold that plaintiff has shown, with appropriate citation of authority, that a court, absent actual fraud or lack of jurisdiction, cannot vacate a decree after the expiration of term time. Accordingly, the order of the chancellor, vacating the decree and denying plaintiff's motion to vacate the order of denial, is reversed, and the cause remanded with directions to allow the decree as entered to stand.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BURKE, P.J., and BRYANT, J., concur.

49078

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| ANDREW S. ALLEN, d/b/a ACE CRAFT HEATING CO., Plaintiff-Appellee, v. WALLACE E. JUNGKANS, d/b/a W.E.J. CONSTRUCTION CO., Defendant and Third-Party Plaintiff-Appellee, v. MIDLAND ENTERPRISES, INC., a Corporation, and NORTHLAKE DRUGS, INC., a Corporation, Third-Party Defendants-Appellants. | ) | 45 I.A.2 287<br>APPEAL FROM<br>COUNTY COURT,<br>COOK COUNTY |

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

In April 1959 defendant Wallace E. Jungkans, d/b/a W.E.J. Construction Company, a general contractor, was engaged in remodeling premises occupied by Northlake Drugs, Inc., in North Lake, Illinois. While so engaged, he requested plaintiff Andrew S. Allen, d/b/a Ace Craft Heating Company, to install and repair certain heating and air-conditioning equipment on the premises in question. It is conceded that plaintiff furnished the necessary materials and labors required, and that the reasonable value thereof was $1324.50, which, however, Jungkans refused to pay. Allen thereupon brought suit in the County Court of Cook County against Jungkans to recover said sum. Allen's complaint consisted of two counts: count I alleged that he had been engaged to perform the services, that the reasonable value of the materials and labor furnished Jungkans was $1324.50, and that, notwithstanding repeated demands, defendant had refused to pay any sum whatever; count II alleged an account stated as of July 3, 1959 between Allen and Jungkans upon the aforesaid balance.

Jungkans' answer stated no issues of fact which would constitute a defense, but he filed a third-party complaint against Midland Enterprises, Inc., and Northlake Drugs, Inc., as third-party defendants, in which he alleged that on April 10, 1959, as general contractor, he agreed to remove a certain party wall and to remodel the building on the premises occupied by Northlake Drugs, one of the third-party defendants; that the contract price for materials and labor to be supplied by Jungkans was $9000.00; that Jungkans completed all the work required to be done under the contract, and, at the special instance and request of Northlake Drugs, performed extra work and furnished additional material having a value of $1322.17; that Northlake Drugs was entitled to $8432.35 in credits on account, leaving due and owing to Jungkans $1889.82, which Northlake Drugs has failed or refused to pay; and that the reasonable value for the services and labor performed and material supplied by Allen on the premises owned and controlled by the third-party defendants was due and owing to Allen by these third-party defendants. Jungkans availed himself of the provisions of sub-section (1) of section 25 of the Practice Act (Ill. Rev. Stat. 1963, ch. 110) by moving to bring in third-party defendants. The court was of the opinion that a complete determination of the controversy required their presence, and so directed that they be made parties to the suit.

Upon this state of the record the court, after hearing evidence, found for Allen and against defendant and third-party plaintiff Jungkans, and also against third-party defendants Midland Enterprises and Northlake Drugs, and assessed damages in the amount of $1324.50; the court further found for defendant and third-

party plaintiff Jungkans and against third-party defendants Midland Enterprises and Northlake Drugs, and assessed damages in the amount of $325.50. Judgment was entered upon these findings in the amounts mentioned.

Third-party defendants Midland Enterprises and Northlake Drugs, appealing from this judgment, contend that it was improperly entered for plaintiff against them because they were never made parties to plaintiff's cause of action; that the pleadings clearly indicate that plaintiff sued only defendant Jungkans, and that accordingly plaintiff can recover only against him and not against third-party defendants who were not joined as parties defendant. Neither plaintiff nor defendant and third-party plaintiff has filed briefs.

The contention of the third-party defendants, that plaintiff cannot recover against them directly, is well taken. The complaint named Allen as plaintiff and Jungkans as defendant. In the prefatory paragraph only the name of Jungkans was stated. In the body of the complaint, in both counts, plaintiff made allegations directed only against Jungkans. It is a fundamental rule of law, requiring no citation of authority, that judgment cannot be had against parties from whom plaintiff does not seek relief.

Although a judgment cannot be entered for plaintiff against the third-party defendants because said third-party defendants were never made parties to plaintiff's cause of action, judgment may be entered for the third-party plaintiff against the third-party defendants because of the filing of a third-party complaint and the third-party defendants' answers. The

third-party complaint of Jungkans against Northlake Drugs, Inc., and Midland Enterprises, Inc., and their answers brought the latter corporations into the proceedings as third-party defendants. Defendant Jungkans has not appealed from the judgment against him in favor of plaintiff Allen in the amount of $1324.50, and that part of the judgment remains undisturbed. We affirm that part of the judgment in favor of third-party plaintiff Jungkans and against third-party defendants Midland Enterprises, Inc., and Northlake Drugs, Inc., in the amount of $325.50, and reverse that part of the judgment in favor of Allen, plaintiff, and against third-party defendants Midland Enterprises, Inc., and Northlake Drugs, Inc., in the amount of $1324.50.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

BURKE, P.J., and BRYANT, J., concur.

49044

KAROL KOCIMSKI,

Appellee

v.

YELLOW CAB COMPANY, a corporation, et al.,

Defendants

On Appeal of YELLOW CAB COMPANY, a corporation,

Appellant

45 I.A.2 288

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Karol Kocimski brought a suit in the Circuit Court of Cook County against Yellow Cab Company and Louis Grassi for damages allegedly sustained when the taxicab in which plaintiff was a passenger was struck by an automobile driven by Grassi. The case was tried before a jury, and on May 28, 1962 the jury found for the plaintiff and against the defendant Yellow Cab Company, assessing damages in the amount of $12,500, and further found that the defendant Grassi was not guilty of any negligence. Judgment was entered by the trial court in accordance with the jury's verdict. The post-trial motions of Yellow Cab Company for judgment notwithstanding the verdict or for a new trial were overruled. From that judgment the Yellow Cab Company now appeals.

The defendant here contends that the verdict was against the manifest weight of the evidence, that the trial court erred in the admission of certain evidence, that the verdict was excessive, and that the jury was prejudiced by certain evidence on behalf of the plaintiff which the court had admitted.

From the record it appears that the case grew out of an accident which occurred on March 6, 1955 at about 9:30 p.m. at the intersection of Division Street and Wolcott Street in the City of Chicago. Division Street runs in an east-west direction, and Wolcott Street runs in a north-south direction. It had been snowing heavily that evening. The snow had ceased falling at the time of the accident, but the streets were covered with snow and ice and were very slippery. The taxicab of the Yellow Cab Company in which the plaintiff was a passenger had been proceeding east on Division Street and had stopped preparatory to making a left turn to go north on Wolcott Street. According to the testimony of the cab driver he was traveling 5 to 10 miles an hour as he approached Wolcott Street. He then put on his "turn signals" and waited for westbound traffic to clear. He waited for a minute or two and then made a left turn into Wolcott. He saw no cars east of him on Division Street. As he made his left turn he was going very slow and he could not estimate the speed because the street was so icy. As he started to make his left turn the cab had trouble getting traction. After he had made the turn the cab remained stationary for two minutes. Most of the cab was in Wolcott Street, with just a couple of feet of it sticking out on Division. He testified that the cause of his stopping was that there was a car in front of him facing south on Wolcott. He then saw a car coming towards him, which was Grassi's car and which car struck him. He could not estimate how fast the car which hit him was traveling at the time it was coming at him. Nor could he tell whether it

skidded or not, though he believed it did since all the area was covered with ice.

Grassi testified that at the time of the accident it had stopped snowing but that the streets were slippery. As he was driving west on Division Street and approached Wolcott Street he saw a cab stop facing east at that intersection, and he could not say whether or not there was any turn signal going on the cab. He saw the cab start to move and make a left turn. He then put on his brakes and skidded or slid into it. When he first saw the cab he was a quarter of a block from Wolcott. In a statement given to the Yellow Cab Company signed by Grassi and introduced in evidence he stated that he was 75 feet east of Wolcott when he first saw the cab and that his car skidded about 90 feet.

A police officer who investigated the accident testified that he took statements from both drivers and that neither mentioned a southbound automobile on Wolcott as preventing the passage of the cab.

The Yellow Cab Company was a carrier of passengers. Carriers of passengers are required to exercise the highest degree of care, vigilance and precaution for the safety of those whom it seeks to transport. 10 Am. Jur. Carriers, sec. 1245. It has been said that the obligation of a common carrier is to do all that human care, vigilance and foresight could reasonably do consistent with the mode of conveyance and the practical operation of its business to convey its passengers in safety to their destination. Alton Light and Trac. Co. v. Oller, 217 Ill. 15, 75 N. E. 419. Questions of negligence, due care and proximate cause are ordinarily

questions for a jury to decide. Ney v. Yellow Cab Co., 2 Ill.2d 74, 84, 117 N.E.2d 74, 80.

No instructions appear in either the abstract or the record, so we must presume that the jury was properly instructed with reference to the duties of the defendants with respect to paragraph 166, chapter 95-1/2, Illinois Revised Statutes, governing left turns. The evidence is in sharp conflict, and there is evidence which could support the verdict at which the jury arrived. In Piltaver v. Djukovich, 39 Ill.App.2d 1, 187 N.E.2d 273, the court said:

> "In a case such as this it is the duty of the jury to reconcile the conflict in the testimony of various witnesses and to render a verdict based upon the evidence which they determine to be the most credible. In order for this court to set aside their verdict it is necessary that we find it to be against the manifest weight of the evidence. The evidence is in sharp conflict. The judge in the trial court had the opportunity of seeing the witnesses and hearing them testify and has placed his stamp of approval on the verdict by overruling the post-trial motion of the defendant. We cannot properly say that the verdict is against the manifest weight of the evidence. Had the jury found for the plaintiff we would perforce reach the same conclusion."

In the instant case the jury found that the driver of the taxicab was negligent in attempting to make a left turn in the face of approaching traffic and under such hazardous conditions that he had difficulty in starting his left turn because of the slippery condition of the streets. The jury could properly find that the action of the taxicab driver was a proximate cause of the accident and not merely a condition upon which Grassi's negligence operated.

Defendant contends that the court was in error in its rulings upon the admission of certain evidence. One such

alleged error was that the court improperly permitted certain testimony concerning the war record of the plaintiff. The plaintiff in the second world war had fought against the Russians and the Nazis as a member of the Polish and British Air Forces, and was wounded in action. Counsel for the Yellow Cab Company, in cross-examining the attending physician, asked him about the scar on the face of the plaintiff and a depression in the cheek bones. The purpose of this evidence must have been to indicate that the present disabilities of the plaintiff resulted from the old injury. The physician answered that the plaintiff had told him that he had had a car accident in Poland and a fractured jaw and it was corrected sometime in England after the war by surgery. The plaintiff testified, while being examined by his counsel with reference to the injury, that it had been treated in England about the end of 1942. He then stated that after he was released from the hospital he "made sixteen missions over Germany." This was not prejudicial. The defendant Yellow Cab Company had opened the door for this testimony, and in order to rehabilitate the plaintiff his counsel properly brought out that after the accidents which had occurred during the war his health was such that he could actively participate in his duties as a member of the Air Force.

It is also contended that the jury was prejudiced because a certain contract was permitted to be introduced in evidence.

The plaintiff is by profession an architect. He

testified that he had both an undergraduate and a graduate degree in architecture from Limberg University in Poland, which was his native land. After he had completed his studies he took a two-year internship in Poland and became registered as a licensed architect in that country in 1933. He practiced his profession in Poland, France and England before emigrating to the United States in 1953. In the United States he worked about a year for a Brooklyn firm specializing in housing. In 1954 he became an architectural designer for Perkins & Will, in Chicago. While he was so employed the accident in question occurred. He later left Perkins & Will, and from 1955 to 1956 taught architecture at the University of Illinois. From 1957 until the time of the trial plaintiff was a full professor of architecture at Iowa State University. He is a citizen of the United States, and is not a licensed architect in any State of the United States.

The plaintiff introduced two contracts in evidence which he had entered into shortly prior to the accident, and which, according to his testimony and the medical testimony in the case, he was unable to perform because of his injuries. The defendant Yellow Cab Company urges that the contract for architectural services in Michigan, which the plaintiff had entered into, should not have been admitted on the ground that the contract was void and unenforceable under Michigan law. During the trial and as a ground for his objection counsel for the Yellow Cab Company called the attention of the court to the governing Michigan statute (Michigan Statutes Anno., vol. 13, chap. 156, sec. 18.84(1) et seq.) That statute

provides that it shall be unlawful for any person to practice the profession of architecture in that State unless he had been duly registered or exempted under the provisions of the Act, which provided a penalty for its violation. In the Act there are certain exemptions, one of which provides that a person who is not a resident of and who has no established place of business in Michigan may practice architecture in the State when such practice does not exceed 60 days in any one year and when the person so practicing is legally qualified to practice the profession in his own State or country, providing that such State or country extends reciprocal privileges to registered architects of the State of Michigan. A further exemption in the Act provides that it should not be construed as preventing a person not registered from planning, designing or supervising the construction of residence buildings not exceeding 2,500 square feet per building in "calculated floor area." A further provision of the statute is that where a nonresident having no established place of business in the State, who is "practicing or offering to practice" for more than 60 days in any calendar year, shall have filed with the board an application for a certificate of registration and paid the required fee, his exemption shall continue only for such time as the board requires for the consideration of the application for registration.

The contract in question was dated February 2, 1955, and called for the plaintiff to prepare programming, design and working drawings for the construction in the State of

Michigan of ten 1-1/2 room cabins and also the conversion and alteration of two farm houses into a hotel. The contract does not specify at what time the actual construction was to be completed. It is provided therein that all architectural drawings were to be submitted not later than August 1, 1955, and that plaintiff's total architectural fee was also to be paid upon August 1, 1955 upon his rendering an account of the services. After the accident on March 6, 1955 the plaintiff was unable to do anything further on the contract. Under the applicable Michigan law a contract such as this is not enforceable. The defendant Yellow Cab Company in its brief cites several Michigan cases, among others Wedgewood v. Jorgens, 190 Mich. 620, 157 N. W. 360. The same rule apparently prevails in Illinois. Keenan v. Tuma, 240 Ill. App. 448. However, it must be noted that all of the cases referred to are cases where there was an attempt by the party who had acted without complying with the statute to enforce the contract against the other party and secure a monetary judgment for services rendered. The Yellow Cab Company contends that the contract between the parties was absolutely void and consequently permitting it to go to the jury was error. Due to the various exceptions to which we have referred in the Michigan statute it does not seem to us that the contract at this early stage of its development was void. The defendant Yellow Cab Company argues in its brief that it is "idle, unrealistic and unfair" to argue that the plaintiff might have obtained a license just before beginning work, and says the plain facts are that while the contract was

entered into on February 2, 1955, as late as March 6, 1955 (the date of the accident) and less than a month from the due date of the "programming drawings" and the first instalment of $1,000 on plaintiff's fee, plaintiff was still unlicensed, and as of the date of the trial some seven years later he remained unlicensed. To us this argument does not seem as conclusive as it does to the defendant Yellow Cab Company. The trial court apparently took the view that the contract might be admissible, having in mind the fact that it was not an attempt to enforce the contract by the plaintiff against the party of the second part but was merely to be considered by the jury as an element in the damages which plaintiff alleged he suffered on account of the accident in question. The court in our opinion did not err in admitting the contract in evidence. We will again refer to the question of the effect of the admission of the contract upon the damages awarded by the jury to the plaintiff.

The plaintiff also introduced in evidence another contract which he had with a firm in England to perform certain architectural services in London. This contract was entered into December 29, 1954. It was not performed because of the injuries suffered by the plaintiff in the accident. That contract provided for certain architectural drawings to be submitted on September 1, May 1, and July 1 of the year 1955, and that the plaintiff would supply certain "American bar equipment" no later than April 1, 1955. The contract provided that the plaintiff was to be paid 1,000 pounds sterling (British currency) for preparing the drawings and

1,800 pounds sterling for furnishing the bar equipment. Under that contract for the drawings the plaintiff would have earned approximately $2,800 (based on approximate value of $2.80 of the pound sterling) plus what profit he might have made on the bar material which he had agreed to supply. As we have said, there are no instructions in the record and hence we cannot determine upon what basis the court instructed the jury concerning the alleged damages of the plaintiff. In the record there appears a bill for $417.55 for three weeks which the plaintiff spent in a hospital, payments by check to Dr. Ernest Zeisler for $245, and testimony by Dr. P. J. Orzynski that a reasonable fee for his services would be $250. This would show an actual out-of-pocket expenditure of $912.55. Dr. William E. Wallace testified that in his opinion neurological surgery would be necessary in order to relieve the pain in the plaintiff's skull, that it would require him to be out of work for about six weeks, and further that a reasonable fee for his services in performing such an operation would be about $400. The aggregate of the expenses would then be $1,312.55, and if we add to that the loss of $2,800 suffered by his failure to perform the British contract, the total would be $4,112.55, exclusive of any profit on furnishing bar equipment. The jury had a right to consider the pain and suffering of the plaintiff which he testified continued up to the time of the trial, and also his present disabilities. If the jury had disregarded entirely the loss alleged to have been suffered because of plaintiff's inability to perform the Michigan contract, it cannot be said that its verdict of

$12,500 is excessive.

The trial court did not err in overruling the post-trial motion of the defendant Yellow Cab Company. The judgment of the Circuit Court of Cook County is affirmed.

Affirmed.

Schwartz, P.J., and Dempsey, J., concur.

(32825—9-66) 14

# STATE OF ILLINOIS

## APPELLATE COURT



AT AN APPELLATE COURT, for the Fourth Judicial District of the State of Illinois, sitting at Springfield:

PRESENT

HONORABLE WILLIAM M. CARROLL, Presiding Judge

HONORABLE C. ROSS REYNOLDS, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

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BE IT REMEMBERED, that to-wit: On the 22nd day of JANUARY A. D. 19 64, there was filed in the office of the said Clerk of said Court an opinion of said Court, in words and figures following:

11206

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10474 Agenda No. 7

Roy W. Baker,

Plaintiff, Counter-Defendant, Appellant,

vs.

T. K. Rinaker, Carlinville National Bank, Harriet R. Howe, Jane T. Gay, Nancy Tenbrook, and O. C. Swift,

Defendants, Counter-Plaintiffs, Appellees.

Appeal from the Circuit Court of Macoupin County



ROETH, Justice.

The plaintiff brought suit for a mandatory injunction to require the defendant to remove a man made obstruction to the natural flow of water from plaintiff's land to and across the defendants' land. Defendants filed an answer denying the charge and also a counter claim to restrain the plaintiff from diverting surface water from his land to the land of defendants and for money damages.

The plaintiff's theory was that he was the owner of the dominant tenement and the defendants were the owners of the servient tenement, the natural flow of the water was from his land onto the defendants' land and that the defendants did not have a right to

fill in a bridge and thereby obstruct the natural flow of water at the boundary between the parties land.

It was defendants' theory that plaintiff dug through natural barriers on his land thereby letting onto defendants' land waters that would not otherwise naturally flow in that direction and also took water from its natural channels and constructed and connected several ditches on plaintiff's own land and converted them into one flowing across defendants' land and wrongfully increasing the flow over the defendants' land.

After a trial before the court without a jury, the court found the issues for defendant on the counterclaim and against the plaintiff on the complaint. Further the court enjoined plaintiff from diverting surface water onto the defendants' farm and awarded defendants damages in the sum of $1057.00 on their counterclaim. The plaintiff has appealed from this decision. Plaintiff and counter-defendant, Roy W. Baker, hereinafter referred to as plaintiff, owns 156 acres of farm land in Macoupin County, Illinois. The defendants and counter-plaintiffs, hereinafter referred to as defendant T. K. Rinaker, et al., are the owners of 150 acres of farm land abutting that of plaintiff on the south.

A roadway runs north and south parallel with the east boundary of both the plaintiff's and defendants' land in question. A railroad crosses over the land of the plaintiff just west of the

southeast corner. The railroad runs more southerly than westerly and dissects defendants' land from just west of the northeast corner to just east of the southwest corner. The land of the plaintiff is divided north and south by a drainage ditch so that plaintiff's common reference is to his "west 80" or to his "east 80". The 156 acres of the plaintiff, as well as being dissected north and south by a drainage ditch, has a diagonal drainage ditch running in a southwesterly direction across the southeast corner of plaintiff's land. This diagonal ditch, connected to a culvert running under the north and south roadway on the east of the land owned by the parties, discharges its flow of water at the intersection of plaintiff's north and south ditch. This diagonal ditch of plaintiffs and a drainage ditch of the defendants all met on the north and south boundaries of the parties. The drainage ditch on the land of the defendants, that connects to the intersection of plaintiff's north and south ditch and plaintiff's diagonal ditch, runs in a southerly direction for about half the length of defendants' land then curves to the west and empties into a north and south ditch that runs parallel to the west boundaries of the parties. The evidence discloses that there existed an east and west "field road" used by the defendants as access to land owned by the defendants abutting plaintiff on the west. This east and west field road was on the north and south boundary of the land in

question owned by the parties to this action. At the intersection of plaintiff's north and south drainage ditch, plaintiff's diagonal ditch and defendants' drainage ditch on the boundary of the "field road" a low spot existed and a makeshift bridge was constructed by defendants. In 1960 this bridge collapsed and, while the testimony differs as to the amount and degree, defendants made an effort to fill this low spot.

Plaintiff testified that his land was four feet higher at the southwest corner of his farm than at the railroad, which the record discloses to be in the southeast corner. He stated that at the north end of his field between the two eighties it is six feet higher than at the point the various drainage ditches intersect. He stated that the general flow of water is down through the area of the intersecting ditches, that part of the water on the north side of his farm flows east at the road, and that some water in the northwest corner flows to the west. He further stated that approximately 116 to 120 acres of his farm drains through the area where the drainage ditches intersect and the outlet for the drainage of the 116 to 120 acres is between the division of his two eighties, at a point where it intersects his south boundary. The plaintiff also testified that immediately south of his boundary line, near the center of the Rinaker farm, there is definitely a ditch or depression to the south. The ditch on the Rinaker farm leads in a southwesterly direction approximately a quarter and a half south

of his southwest corner to intersect with the artificial ditch running south along his west boundary line. The plaintiff further testified that there is a culvert under the public highway to the east of his farm, which is the culvert north of the railroad approximately 400 feet, and that the culvert has been in ever since he has known the place and has been replaced at various times. The water flows from east to west through the culvert under the public highway north of the railroad, onto his farm. The plaintiff stated that water then flows out through his property and leaves his property on the south line at a midway point between his two eighties. He stated that his land is higher than the Rinaker farm, and that the ditch or depression on the Rinaker farm immediately south of his place is at least two feet deep and forty or fifty feet wide and has been there over forty years.

In regard to the alleged obstruction plaintiff testified that defendants filled the depression up completely, hauled dirt and rock from construction and dumped it in this area, took a maintainer and pushed approximately a foot of rock and dirt in the fence row and that other such work has been done since. In testifying as to plaintiff's Exhibit No. 2, being a photograph of the area, plaintiff stated that the objects in the lower right corner of the photograph were ties laid for the purpose of obstructing the flow of water.

The defendant, T. K. Rinaker, testified that the north part

of the Baker land flows east and southeast up to and across the railroad, the general slope being to the southeast beyond the railroad. He stated that the water, so far as it would drain out of the low place in the Baker land, naturally flowed to the east. He also stated that there is an area in the southwest corner of the Baker eighty that naturally flows onto our land. Mr. Rinaker testified that he was acquainted with the culvert installed by the highway commissioner which runs east and west under the public road along the Baker east line. He stated that he was also acquainted with the diagonal ditch in the Baker east eighty. Mr. Rinaker also stated that as a result of the replacement of the roadway culvert and the construction of the diagonal Baker ditch about 400 acres to the north and east, in so far as they drained at all, drained onto the Baker farm and then onto his farm. He stated that this 400 acres did not drain onto his land until the culvert was replaced and the Baker artificial ditch constructed. He also stated that the natural slope or flow in the Baker east eighty is to the southeast and that the Baker west eighty has a cup in the middle of it but that with artificial drainage the drainage is to the west.

A Mr. Denver W. Kunz, manager of the farms belonging to T. K. Rinaker and heirs, testified that the flow of the Baker land is to the south and east; that the contour interval map shows a

drop in elevation approximately eight to ten feet per mile from north to south and about two to eight feet east to west in this particular community. He further testified that the flow on the Baker east eighty, if there were no obstructions, would go to the southeast, except for a very small acreage which would go almost to the south. He also testified that approximately twenty acres of the Baker land would naturally drain onto the Rinaker land.

Plaintiff's father, various neighbors and the local highway commissioner all testified as to the lay of the land and the direction of the drainage. Testimony of this nature was offered by both plaintiff and defendants.

At the close of the trial the court viewed the premises in the company of counsel.

The case at bar presents an analagous situation to that of Anderson v. Super, 28 Ill. 2d 319, 192 N.E. 2d 339, where the Supreme Court observed as follows:

> "Although the briefs advance numerous and uncontrovertible propositions of law concerning the rights to natural drainage and injunctive relief, the question presented for determination is the factual issue of whether the fill and structures placed on defendants' land have in fact obstructed the natural flow of surface waters from plaintiffs' tract."

In addition, the court in the case at bar was confronted with the factual issue of the counterclaim,that is whether plaintiff had increased the flow of water over defendants' land.

Matters of controversy are for determination by the trial

court. The trial court's findings will not be disturbed upon appeal unless manifestly against the weight of the evidence. Kremeyer v. Shumate, 20 Ill. App. 2d 542.

Different witnesses had different versions of the area and the course of drainage, and different reasons for water accumulating and failing to drain. The court in this instance accepted the version of the defendants' witnesses both as to the matters alleged in the complaint and counterclaim. The trial judge personally saw and heard the witnesses as well as having viewed the scene and we will not substitute our judgment of the facts for his. Kremeyer v. Shumate, 20 Ill. App. 2d 542; Anderson v. Super, 28 Ill. 2d 319.

The decree of the Circuit Court of Macoupin County is affirmed.

Carroll, Presiding Justice, and Reynolds, Justice, concur.

49053

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| SONYA DIANE SUKOWSKI, Plaintiff-Appellee, | ) | APPEAL FROM |
| v. | ) | SUPERIOR COURT |
| ERNEST JOHN SUKOWSKI, Defendant-Appellant. | ) | COOK COUNTY |

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order of the Superior Court of Cook County entered nunc pro tunc as of October 15, 1962, denying a motion made by defendant on November 8, 1962, to vacate a decree of divorce entered on October 11, 1962, pursuant to Section 50 (6) of the Illinois Civil Practice Act.

The plaintiff, Sonya Sukowski, and the defendant, Ernest Sukowski, negotiated a property settlement agreement on August 4, 1962, prior to the hearing of a divorce action brought by Mrs. Sukowski on the grounds of extreme and repeated physical cruelty. There was no provision for alimony in this agreement.

On August 6, 1962, the complaint requesting divorce was filed and the defendant submitted to personal service of process on the same day.

On September 11, 1962, after the time for filing of defendant's appearance or answer had expired, the parties executed another property settlement agreement which was identical with the original agreement except that plaintiff was to be permitted to reserve alimony in exchange for an agreement that neither party would ask court permission to remove the minor children from the jurisdiction without consent of the other.

On September 24, 1962 an order of default and an order setting the matter for hearing as a default matter on October 9,

1962 were entered.

Upon hearing of the cause on October 9, 1962 the court was advised of the agreement of August 4, 1962, and, upon the belief that said agreement constituted a part of an unlawful agreement, it was stricken. When the agreement of September 11, 1962, was presented to the court, the court refused to approve that portion of the agreement which provided for a reservation of alimony but insisted that plaintiff accept an additional award of $100 per month as and for alimony. The defendant was not present in court on that day and there was no notice of the modification sent to him. The decree of divorce was entered on October 11, 1962 and the court modified agreement was adopted. The defendant appeared through an attorney on October 10 in order that the decree might be modified or opened.

The appellee interposestwo points to justify the failure to give notice to the defendant: (1) that the default was merely formal because a former attorney for defendant was present in the courtroom at the time of the modification of the agreement and did represent defendant's interests; (2) that the additional relief was not sought by the plaintiff as required by the literal language of Section 34 and Supreme Court Rule 7-1.

The term "formal default" has no legal relevancy. Ernest Sukowski was in default and was entitled to any and all rights ordinarily accorded to a defaulted party.

Although additional relief was not sought by the plaintiff, the court granted additional relief upon its own motion. Section 34 provides:

> ". . . . Except in case of default, the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise. In case of default, if relief beyond that prayed in the pleading to which the party is in default is sought, whether by amendment, counterclaim, or otherwise, notice shall be given the defaulted party as provided by rule." (Ill. Rev. Stat., 1955, Ch. 110, §34).

Supreme Court Rule 7-1 provides:

> "(1) If new or additional relief whether by amendment, counterclaim, or otherwise is sought against a party not entitled to notice under Rule 5, notice shall be given him as herein provided. The notice shall be captioned and numbered in the case, and directed to the party. It shall state that a pleading seeking new or additional relief against him has been filed and that a judgment or decree by default may be taken against him for the new or additional relief unless he files an answer or otherwise files an appearance in the office of the clerk of the court within 30 days after service, receipt by registered mail or the first publication of the notice, as the case may be, exclusive of the day of service, receipt or first publication . . . ." (Ill. Rev. Stat., 1955, Ch. 110, §101.7-1).

The suggestion that the word "sought" as used in Section 34 applies only to plaintiff and not to a motion by the court has no validity. Section 34 in reference to defaults was intended to protect a defaulted party from the entry of a greater judgment against him than was asked in the complaint without proper notice. The rationale and policy of the provision exist no less where the court grants additional relief upon its own motion than where the plaintiff himself seeks additional relief. The courts have consistently held that where "other relief is sought the court shall by proper orders and upon such terms as may be just protect the adverse party against prejudice by reason of surprise." Western Smelting Co. v. Benj. Harris & Co., 302 Ill. App. 535; Glass v. Glass, 9 Ill. App.2d 568.

Equitable considerations in this case demand in fairness that the agreement be not modified unless the defendant be given notice in accordance with Rule 7-1 and an opportunity to present his financial situation at a proper hearing.

The suggestion that the provision of the agreement reserving alimony authorized the court to give additional relief without notice upon its own motion has no validity. Whenever alimony is determined or changed by a court exercising its discretion in accordance with the public interest (Jacobs v. Jacobs, 328 Ill. App. 133, 139-140; Adler v. Adler, 373 Ill. 361; Maginnis v. Maginnis, 323 Ill. 113; Herrick v. Herrick, 319 Ill. 146) ample opportunity is given both sides to show a change of circumstances in regards to the economic situations of the parties. In this case there is no question of changed circumstances and no opportunity was given to the defendant to present his own economic ability to pay alimony.

We need not discuss the question of the denial of the motions to vacate. An amendment such as this occurring after default automatically sets aside the default. 4 Nichols Illinois Civil Practice, (1960), §4165, pp. 225-226. The case of Carnes v. Carnes, 333 Ill. App. 316, 322, discusses the rationale for the rule:

> ".... Courts have applied the rule to protect litigants from injustice. A defendant might see fit not to answer an original pleading and yet be anxious to join the issue in the pleading as amended, thus he is given an opportunity to meet plaintiff's entire pleading. A previous default decree must, necessarily, be vacated since the defendant could not answer while a default decree stood against him."

Rather than cause the parties further financial burden and realizing that the alimony provision is the only issue between the parties at this stage, we affirm the decree of divorce and all parts of the property settlement agreement except that providing for $100 per month alimony. That alimony provision is reversed, but the Circuit Court is given the discretion of allowing notice to be given within 30 days and having a hearing in accordance with the terms of Supreme Court Rule 7-1 on the financial ability of the defendant to meet the alimony burden. If that discretion is not exercised the decree is affirmed as amended by deleting the finding and order that defendant pay to the plaintiff $100 per month as alimony and by including therein a finding and an order that any claim by plaintiff for alimony is reserved, the amount thereof in the future to be determined on a hearing after due notice in accordance with the then earnings and financial status of the defendant.

AFFIRMED IN PART AND
REVERSED IN PART.

BURKE, P.J., and FRIEND, J., concur.